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No. 97-2048

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

WILLIAM D. O'SULLIVAN,

Petitioner,

v.

DARREN BOERCKEL,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF FOR PETITIONER

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Printed by Authority of the State of Illinois (P.O. 37183—55—3-1-99)

15pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES

ARGUMENT

THE EVOLUTION OF THE REMEDY OF *HABEAS CORPUS*, IN GENERAL, AND THE DOCTRINE OF EXHAUSTION, IN PARTICULAR, JUSTIFY THE ENFORCEMENT OF A RULE REQUIRING PETITIONERS TO RAISE THEIR CLAIMS TO THE HIGHEST COURT OF THE STATE ON DIRECT APPEAL IN ORDER TO PRESERVE THOSE CLAIMS FOR FEDERAL COLLATERAL REVIEW.

A. The Court of Appeals' Holding Conflicts With Principles of Federalism And Comity.

Boerckel spends virtually his entire brief focusing on state law, specifically, Illinois Supreme Court Rule 315, to support the claim that a *habeas* petitioner need not have brought his *habeas* claims on direct appeal in a petition for discretionary review to the state's highest court. As will be shown, Boerckel errs in focusing on state law to answer the exhaustion/default question presented in this case, errs in his interpretation of Illinois discretionary review, and is in no position to articulate the complaints which he raises regarding O'Sullivan's argument.

The flaw in Boerckel's focus on state law is perhaps best exemplified by his reliance on cases such as *State v. Sandon*, 161 Ariz. 157, 777 P.2d 220 (Ariz. 1989). (Resp.'s Br. at 16). In that case, following a federal court dismissal of a *habeas* petition for failure to exhaust state court remedies, Sandon filed a petition to review the claims in the Arizona Supreme Court in order to exhaust state remedies. The Arizona Supreme Court dismissed the petition on the ground that Sandon need not present the claims to that court in order to exhaust state remedies. *Sandon*, 777 P.2d at 221. However, in a later decision, the United States Court of Ap-

peals held that such a state court declaration may not dictate for federal *habeas* courts whether exhaustion of state remedies has occurred. *Jennison v. Goldsmith*, 940 F.2d 1308 (9th Cir. 1991) (*per curiam*). Confronted with a claim based on *Sandon*, the *Jennison* court rejected the claim and found as follows:

> The Arizona Supreme Court has confused review as of right under state law with "the right under the law of the state to raise" an issue within the meaning of the federal habeas statute. 28 U.S.C. § 2254 (1988). While Jennison does not have an appeal as of right to the Arizona Supreme Court [citation omitted], he does have the right to raise before the Arizona Supreme Court the issue he seeks to raise in federal habeas[.] [Citations omitted].

Jennison, 940 F.2d at 1310.

Boerckel raises essentially the same claim as those Arizona petitioners when he asserts that "discretionary review does not grant a petitioner the 'right' to present a claim." (Resp.'s Br. at 21). In like manner, *Amicus Curiae* describes the filing of leave applications in discretionary courts as an "arid ritual and empty formality" for which review will rarely be granted. (*Amicus Curiae* Br. at 8). Such a claim is insulting to the high courts of the states, and insulting to this Court, as well. Under Boerckel's apparent theory, if a petitioner raises a particular claim in a federal *habeas* petition and simultaneously raises that same claim in a state petition for discretionary review, the government should never prevail on a motion to dismiss the *habeas* petition for failure to exhaust state court remedies. This would be an absurd result, contrary to notions of federalism and comity, since the petitioner potentially could obtain relief in the state courts.

In *Jennison*, the court found that, while the state may determine what remedies are available to a prisoner alleging incarceration in violation of federal law, it is federal law which determines the sufficiency of exhaustion of state remedies. *Jennison*, 940 F.2d at 1311 n.4. O'Sullivan maintains that such a construction best comports with 28 U.S.C. § 2254(c) and fosters interests of federalism and comity.

Simply put, if an issue is important enough to warrant inclusion in a federal petition for a writ of *habeas corpus*, then it is important enough to first be presented to the state's highest court. If a claim alleges error of federal constitutional magnitude, as required by 28 U.S.C. § 2254, then every state court that could conceivably grant relief on the claim should have the initial opportunity to do so. *See McCleskey v. Zant*, 499 U.S. 489, 491 (1991) ("Our federal system recognizes the independent power of a State to articulate societal norms through criminal law; but the power of a State to pass laws means little if the State cannot enforce them.") Even under Boerckel's interpretation of Illinois Supreme Court Rule 315, a *bona fide* future *habeas* claim is sufficiently significant to warrant inclusion in a petition for leave to appeal.

Both Boerckel and *Amicus Curiae* seek to rely on *Castille v. Peoples*, 489 U.S. 436 (1989), in support of the claim that presentment to an intermediate state appellate court alone should be deemed fair presentment for federal *habeas* purposes. They do not rely on the holding in *Castille*, but rather on a portion of the rationale for the holding. This Court described the issue presented in *Castille* as "whether the presentation of claims to a State's highest court on discretionary

review, without more, satisfies the exhaustion requirements of 28 U.S.C. § 2254." *Castille*, 489 U.S. at 349. The Court found that it did not. Accordingly, the actual holding of that case offers no support for Boerckel's position.

O'Sullivan acknowledges that, as part of the rationale for its holding against the respondent in *Castille*, this Court relied on a Pennsylvania rule of appellate procedure which, as quoted in the decision, is arguably similar to a portion of Illinois Supreme Court Rule 315. That fact should not lead to the conclusion, suggested by Boerckel and *Amicus Curiae*, that presentation to an intermediate state appellate court alone is sufficient to exhaust state remedies. First, Illinois Supreme Court Rule 315 does not define that court's jurisdiction as narrowly as the Pennsylvania rule quoted in *Castille*. However, even were it otherwise, the rationale expressed in *Castille* should not dictate the result Boerckel seeks. O'Sullivan does not contest the holding of *Castille* that the initial presentation of a claim in a discretionary forum does not amount to fair presentation for purposes of *habeas* review. It does not follow, however, that raising a claim only where there is an appeal as of right is fair presentation.

In his extensive argument on the point, Boerckel mischaracterizes Illinois Supreme Rule 315. The Rule provides as follows:

> Whether such a petition will be granted is a matter of sound judicial discretion. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered: the general importance of the question presented; the existence of a conflict between the decision sought to be reviewed and a decision of the Supreme Court, or of another division of the Appellate Court; the need for the exercise of the Supreme Court's supervisory authority; and the final or interlocutory character of the judgment sought to be reviewed.

Illinois Supreme Court Rule 315(a). In his brief, Boerckel fails to acknowledge the complete language of the rule set forth above. More specifically, he ignores the Illinois Supreme Court's explicit pronouncement that the listed factors "neither control[ ] nor measure[ ] the court's discretion." This language unequivocally states that the specified factors are not to be viewed as an exhaustive list.

Further, Boerckel offers no support for his conclusion that the Illinois Supreme Court would not entertain claims such as those which he failed to raise in his discretionary appeal. In fact, the Illinois Supreme Court, on discretionary review, has both entertained and granted relief on the types of claims which Boerckel chose not to raise in his petition for leave to appeal. *People v. Toolate*, 101 Ill.2d 301, 461 N.E.2d 987 (1984) (Defense petition for leave to appeal allowed; reversal of conviction for insufficient evidence); *People v. Woods*, 184 Ill.2d 130, 703 N.E.2d 35 (1998) (Defense petition for leave to appeal allowed; reversal of conviction and remand premised on finding that confession was involuntary); *People v. Smith*, 93 Ill.2d 179, 442 N.E.2d 1325 (1982) (Defense petition for leave to appeal allowed; reversal and remand for invalid waiver of rights under *Miranda v. Arizona*, 384 U.S. 436 (1966)). Given these examples, it is evident that the Illinois Supreme Court does, indeed, address fact-specific questions.

Boerckel also errs in his conclusion as to how Illinois courts view the failure to raise a claim on discretionary review. He cites *People v. Edgeworth*, 30 Ill.App.3d 289, 332 N.E.2d 716 (1st Dist. 1975), for the proposition that "a petition for leave to appeal to the Illinois Supreme Court is not the kind of proceeding to which application of the doctrine of waiver is appropriate." (Resp.'s Br. at 12). He argues that, since the absence of a claim from a petition for leave to appeal would not result in forfeiture under state law, it similarly cannot result in forfeiture for federal *habeas corpus* purposes. (*Id*). However, he is simply incorrect.

It is true that, for purposes of collateral attack under the Illinois Post-Conviction Hearing Act, (now 725 ILCS 5/122-1 *et seq.*), the denial of a petition for leave to appeal on direct appeal cannot result in a finding of *res judicata* effect for an issue which was raised in the petition or result in a finding of waiver of an issue which was not. *Edgeworth*, 332 N.E.2d at 720.[1] But that fact has no relevance to the issue presented at bar. The

[1] The *Edgeworth* court noted how the denial of *certiorari* by this Court "decides nothing as to the merits raised in the petition," and found a similar lack of meaning in a denial of leave to appeal by the Illinois Supreme Court. *Edgeworth*, 332 N.E.2d at 720. Boerckel seizes upon this similarity to argue that he should not, on pain of forfeiture, be forced to raise claims in a petition for discretionary review to the Illinois Supreme Court. (Resp.'s Br. at 7-8). At a later point in his brief, Boerckel cites *Fay v. Noia*, 372 U.S. 391, 435 (1963), in support of the same proposition. (Resp.'s Br. at 18) As argued in O'Sullivan's original brief, the similarity between these practices does not warrant the rule Boerckel proposes, because, unlike *certiorari* in this Court, allowing a state's highest court to review a state court conviction fosters interests of federalism and comity. (Pet.'s Br. at 24-25).

issue here is not whether Boerckel would have waived issues on state collateral attack by his failure to raise them in earlier discretionary review. It is whether he is precluded by that failure from raising those issues on federal collateral review, which statutorily requires exhaustion of state remedies. As argued in O'Sullivan's original brief and above, the question of exhaustion of state remedies should be answered by the federal courts.

Given Boerckel's substantial legal errors, a number of his arguments may be readily rejected. Boerckel contends that, should O'Sullivan prevail, the Illinois Supreme Court will be inundated with petitions for leave to appeal raising claims which Boerckel believes are not contemplated by Illinois Supreme Court Rule 315, and that this, in turn, will hamper judicial efficiency. (Resp.'s Br. at 8, 24). As previously discussed, Boerckel misperceives the scope of discretionary review under Rule 315. Moreover, from the statistics found in Boerckel's own brief, it appears that the Illinois Supreme Court already is so inundated. At footnote 5, Boerckel notes that, in 1997, more than one-half of the filings in that court were petitions for leave to appeal. (Resp.'s Br. at 17 n.5). At footnote 2, Boerckel includes a statistic of the small percentage of petitions actually allowed. (Resp.'s Br. at 8 n.2). This suggests that few petitioners before that court brought claims which met the criteria of Rule 315, as Boerckel characterizes them, even at a time when the law in the Seventh Circuit did not require *habeas* petitioners to bring such claims to the state's highest court in order to exhaust them. *Hogan v. McBride*, 74 F.3d 144 (7th Cir.), *modified on reh'g denied*, 79 F.3d 578 (7th Cir. 1996).

In various sections of his brief, Boerckel raises the concept of procedural default, at one point claiming that procedural default, and not exhaustion, is the issue, (Resp.'s Br. 5, 13), and later allowing that exhaustion which ripens into default indeed might be the issue. (Resp.'s Br. 19-20). In the first instance, Boerckel's argument is driven by the assumption that state law controls whether or not a procedural default exists, and he claims that, since he properly complied with Illinois Supreme Court Rule 315, no procedural default exists. There are dual problems with that argument. First, it assumes that the independent and adequate state ground doctrine is the only means by which a petitioner can default a claim for federal *habeas corpus* purposes.[2] Such is not the case. Federal courts have found procedural default when a claim has never been presented to the state courts prior to a *habeas corpus* petition. *Rodriguez v. Peters*, 63 F.3d 546, 555 (7th Cir. 1995); *Coleman v. Thompson*, 501 U.S. 722, 735 n.1 (1991); (*see* Pet.'s Br. at 15-16). In that instance, there would have been no opportunity for the state courts even to have articulated a rule of default. Second, Boerckel's claim of lack of default is premised on what O'Sullivan already has shown to be an erroneous interpretation of Illinois Supreme Court Rule 315.

Boerckel's argument against a failure to exhaust ripening into a procedural default rests on his same erroneous interpretation of Illinois Supreme Court Rule 315, and must fail for the reasons already articulated. Moreover, even accepting Boerckel's interpretation of

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[2] This appears to have been the rationale of the Seventh Court in its earlier decision in *Hogan v. McBride*, 74 F.3d at 146.

Illinois Supreme Court Rule 315, it is the federal courts, and not the state courts, which should determine whether resort to a particular state remedy is required for exhaustion purposes. O'Sullivan already has shown the desirability of discretionary review by a state's highest court for exhaustion purposes. Boerckel's argument to the contrary should be rejected.

O'Sullivan next maintains that Boerckel is hardly in the position to assert a number of his criticisms of the efficacy of state discretionary review. First, the very claims which he raised in his petition for leave to appeal do not even fit his own interpretation of Supreme Court Rule 315. Boerckel argues that the Rule "channels relatively routine fact sensitive questions to the intermediate appellate courts, reserving the supreme court for issues of broader significance" (Resp.'s Br. at 17), and that O'Sullivan's position would "burden the Illinois Supreme Court with fact-intensive claims." (Resp.'s Br. at 24). In his petition for leave to appeal, Boerckel raised the following three claims: (1) that the Appellate Court erred in holding that he was not under arrest prior to giving any incriminating statements to the police officers; (2) that the Appellate Court erred in holding that he waived the issue of whether or not he was denied a fair trial as a result of prosecutorial misconduct for failing to adequately specify it in his post-trial motion; and (3) that the Appellate Court erred in denying paragraph 14 of his motion for discovery, which requested any and all evidence developed on any other individuals that were possible subjects in the alleged crime in the indictment. (R.50, O'Sullivan's Exhibit E-Petition for Leave to Appeal, *People v. Boerckel*, No. 51757). These were mere requests that the Illinois Supreme Court apply settled law to the facts of an indi-

vidual case. They were not issues of particularly broad importance.

Moreover, contrasting the claims raised in Boerckel's petition for leave to appeal with those raised in his amended federal *habeas* petition further undermines his position. Boerckel posits that petitions for leave to appeal in Illinois are reserved for issues of broad significance. Similarly, the writ of *habeas corpus* is deemed an extraordinary remedy. *See Brecht v. Abrahamson*, 507 U.S. 619, 633 (1993). Presumably, then, one would expect to see a similarity of claims in petitions filed in both courts. Such is not so here. Boerckel abandoned his state court claim of prosecutorial misconduct in his amended *habeas* petition, and persisted in asserting a Fourth Amendment claim, which almost certainly would be doomed under *Stone v. Powell*, 428 U.S. 465 (1976). On the other hand, Boerckel raised several constitutional claims in his amended *habeas* petition, three of which he had failed to raise on leave to appeal in state court, and one of which he never raised in the state courts. Boerckel should not be heard to complain that discretionary review is not a meaningful or desirable remedy for exhaustion purposes.

Finally, Boerckel is not in the position to complain regarding the lack of counsel on discretionary review. He criticizes O'Sullivan's argument that there is little risk that an unrepresented petitioner will be able to present perfected claims to a state's highest court. (Resp.'s Br. at 14 n. 4 (*citing* Pet.'s Br. at 31)). Since counsel prepared Boerckel's petition for leave to appeal, Boerckel never faced the dilemma suggested by the Court of Appeals. Moreover, his discussion regarding preparation of his federal *habeas* petition is entirely

beside the point, which was that virtually anyone could copy the already perfected claims from the intermediate appellate court brief for use in a petition for leave to appeal. O'Sullivan stands by the argument posited in his original brief on the point. (Pet.'s Br. at 31).

As O'Sullivan has already argued, the fact that Illinois may encourage selective presentation of issues is entirely consistent with the fact that federal *habeas corpus* is itself an extraordinary remedy. Boerckel's argument fails to recognize this correlation. Moreover, his argument is based on a faulty premise, because he focuses on state rather than federal law to answer the question of what is necessary to achieve exhaustion of state court remedies. Furthermore, his argument is premised on erroneous interpretations of Illinois law. Finally, his own contradictory actions in the case at bar serve to undermine his position.

The doctrine of exhaustion of state court remedies, rooted as it is in concerns of federalism and comity, requires that state courts be given the first opportunity to examine and correct federal constitutional errors in state court convictions. Allowing the highest state court to review a state court conviction advances these interests. Because the Court of Appeals' holding here conflicts with these well-settled principles, its decision should be reversed.

B. The Rule Proposed By O'Sullivan Would Be Consistent With This Court's Recent Precedents In *Habeas Corpus* Law.

Since Boerckel does not address the bulk of the points raised in this section of O'Sullivan's original brief, O'Sullivan will stand on his original arguments.

CONCLUSION

For the aforementioned reasons, and for the reasons explained in the Petitioner's original brief, Petitioner, William D. O'Sullivan, respectfully requests this Court to find that the United States Court of Appeals for the Seventh Circuit erred in holding that an individual who is in custody pursuant to a state criminal conviction may pursue claims in a federal *habeas* petition despite the fact that he failed to raise those claims on direct appeal in a petition for discretionary review to the state's highest court, and order the affirmance of the United States District Court's decision denying federal *habeas* relief.

Respectfully submitted,

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